STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 9, 2008
v	No. 277473 Oakland Circuit Court
LEROY GEORGE BURSLER, Defendant-Appellant.	LC No. 2006-207232-FC

Before: Davis, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(b), and contributing to the delinquency of a minor, MCL 750.145. He was sentenced to concurrent prison terms of 7 to 20 years each for the CSC convictions and 23 days served for contributing to the delinquency of a minor conviction. He appeals as of right. For the reasons set forth in this opinion, we affirm.

The complainant testified that in August 2004, when she was 14 years old, she and defendant, her father, shared some marijuana. Shortly thereafter, defendant began kissing her. Afterward, while the complainant was taking a shower, defendant opened the shower curtain and looked at her. After the complainant finished her shower, defendant entered her bedroom and gave her a back rub. He then removed her clothing and performed oral sex on her, and also engaged in sexual intercourse. Although the complainant testified that this incident occurred in August 2004, she did not disclose it to an adult until November 2005, when she told her boyfriend's mother and the mother's friend. The defense theory at trial was that the complainant fabricated the allegations in November 2005, because she wanted to be emancipated from defendant and move out of his home to live with her boyfriend. Defendant claimed that he had many problems controlling the complainant's behavior and believed that she wanted to move out because she did not like following his rules.

Defendant contends that he was deprived of the opportunity to present a defense when the trial court granted the prosecution's motion in limine to exclude evidence of the complainant with her middle finger in the air, testimony about complainant's suicide attempt in 2003, letters to her former boyfriend and a card from a local police department which noted that complainant had called defendant and told him his car window was smashed. "This Court . . . reviews de novo the constitutional question whether a defendant was denied [his] constitutional right to present a defense." *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). However,

because defendant never argued below that the trial court's rulings prevented him from presenting a defense, this constitutional issue is unpreserved and our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

As this Court explained in *People v Unger*, 278 Mich App 210, 249-251; 749 NW2d 272 (2008), lv pending:

> Few rights are more fundamental than that of an accused to present evidence in his or her own defense. *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v South Carolina*, 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006) (internal quotation marks and citations omitted). This Court has similarly recognized that "[a] criminal defendant has a state and federal constitutional right to present a defense." *Kurr*, *supra* at 326.
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> However, an accused's right to present evidence in his defense is not absolute. *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998); *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). "A defendant's interest in presenting . . . evidence may thus '"bow to accommodate other legitimate interests in the criminal trial process."'" *Scheffer*, *supra* at 308 (citations omitted). States have been traditionally afforded the power under the constitution to establish and implement their own criminal trial rules and procedures. *Chambers*, *supra* at 302-303.
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> Like other states, Michigan has a legitimate interest in promulgating and implementing its own rules concerning the conduct of trials. Our state has "broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer*, *supra* at 308, quoting *Rock v Arkansas*, 483 US 44, 56; 107 S Ct 2704; 97 L Ed 2d 37 (1987). MRE 703, which requires expert witnesses to base their opinions on facts in evidence, does not infringe on a criminal defendant's right to present a full defense. Instead, it merely serves to ensure that the expert opinions presented in the courts of this state are relevant and reliable. Nor is a criminal defendant's constitutional right to present a defense infringed by MRE 402, which simply bars the admission of irrelevant evidence. These rules of evidence help to ensure the integrity of criminal trials and are neither "arbitrary" nor "disproportionate to the purposes they are designed to serve."

In this case, the trial court precluded defendant from offering the above-cited testimony about the complainant. Defendant was also precluded from questioning a former neighbor who noticed that the complainant had skipped school. Contrary to what defendant argues, however, the trial court did not unfairly allow the prosecutor to portray the complainant as a normal or

typical teenager while precluding him from presenting evidence of his troubled relationship with the complainant and her behavioral problems, as relevant to his theory of defense.

The defense theory was that the complainant was a difficult child with behavioral problems, and that she fabricated the allegations against defendant because she did not want to follow defendant's rules and because she wanted to be emancipated from defendant so she could live with her boyfriend. The trial court permitted defendant to offer ample testimony about the state of his relationship with the complainant at both the time of the charged offenses and when the accusations were made, and the complainant's behavior during both periods was the subject of much testimony at trial. Defendant was permitted to offer evidence that the complainant was a troubled child who caused him many problems, including that he and the complainant had many arguments over issues such as the complainant's friends and boyfriends, suspected drug use, school attendance, and failure to comply with defendant's household rules. The complainant admitted that her disclosure of the allegations against defendant was preceded by a heated and violent argument, following which she left defendant's home and went to her boyfriend's home. In sum, ample testimony was both permitted and presented concerning the complainant's behavior and reasons why she no longer wanted to live with defendant.

The trial court's refusal to permit defendant to explore the complainant's psychological condition in detail, or other behavioral problems that were not directly related to either defendant's relationship with the complainant, the charged offenses, or the circumstances surrounding the complainant's disclosure of the accusations, did not prevent defendant from presenting his theory of defense.

Defendant next argues that the trial court erroneously excluded evidence of a letter that the complainant wrote to a former boyfriend. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). Any preliminary questions of law are reviewed de novo. *Id.*

Defendant offered the letter in support of his theory that the complainant wanted to have relationships with teenage boys, which he argued was a motive for her to fabricate the allegations against him. Contrary to what defendant argues, the trial court did not exclude the letter on the ground that it was barred by the rape-shield statute, MCL 750.520j. Rather, the court found that the letter was inadmissible hearsay.

"Hearsay is defined as an out-of-court statement offered in evidence to prove the truth of the matter asserted." *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997); MRE 801(c). Hearsay is generally not admissible as substantive evidence unless it is offered under one of the exceptions to the hearsay rule contained in the Rules of Evidence. *Tanner*, *supra*; MRE 802.

Defendant argues that the letter in question was not hearsay because it was not offered for its truth, but rather "to support Defendant's theory that [the complainant] made false allegations against [defendant] because she was angry with him and so that she could get out of the house and avoid his behavioral restrictions." However, the letter does not contain any references to defendant or the complainant's feelings about defendant, or any statements indicating that the complainant wanted to leave defendant's house to avoid his restrictions. It merely refers to the complainant's desire to engage in sexual activity with a former boyfriend. Thus, the letter had

no relevance apart from establishing the truth of the matter asserted therein, i.e., the complainant's desire to engage in sexual activity with her boyfriend. Accordingly, the trial court did not err in ruling that the letter was hearsay. Because defendant did not identify an applicable exception to the hearsay rule, the trial court did not abuse its discretion by excluding the letter.

Defendant next argues that a new trial is required because evidence of his abusive history toward both the complainant and his ex-wife was introduced at trial, contrary to MRE 404(b)(1). Because defendant did not object to the challenged testimony at trial, this issue is not preserved. Accordingly, the issue is reviewed for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764. Defendant also argues that defense counsel was ineffective for failing to object to the evidence. To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996).

MRE 404(b)(1) prohibits evidence of a defendant's other bad acts when offered "to prove the character of a person in order to show action in conformity therewith." But evidence of other crimes, wrongs, or acts is admissible under MRE 404(b)(1) if the evidence is (1) offered for a proper purpose, i.e., one other than proving the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

In this case, the offenses were allegedly committed in August 2004, and the complainant did not report them until November 2005. Thus, the complainant's delay in reporting the offenses was an issue of consequence at trial. The complainant was permitted to testify regarding her knowledge of defendant's physical abuse of defendant's ex-wife in order to explain why she was afraid of defendant and, therefore, did not attempt to stop him during the offenses or immediately report the offenses. This testimony was admissible for a proper, noncharacter purpose under MRE 404(b)(1). See *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996). Testimony regarding defendant's other physical acts against the complainant likewise was relevant to explain her delay in reporting the offenses. *Id.* Further, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Indeed, it was defendant who attempted to highlight the difficult and troubled relationship between he and the complainant in support of his theory that the complainant fabricated the allegations against him so that she would not have to live with him. The complainant and defendant both testified that they had frequent arguments that sometimes led to physical abuse, although they disagreed on the type or extent of the abuse. In light of this backdrop, the challenged testimony was not unduly prejudicial. See *People v Carner*, 117 Mich App 560, 566-567; 324 NW2d 78 (1982). Accordingly, the challenged testimony did not constitute plain error.

Further, because the testimony was admissible, defendant has not established that defense counsel was ineffective for not objecting to it at trial. Any objection would have been futile. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant next argues that improper conduct by the prosecutor denied him a fair trial. Because defendant did not object to the challenged conduct at trial, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764; *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Claims of prosecutorial misconduct are decided case by case and the challenged comments must be read in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

Defendant first argues that the prosecutor improperly commented on his exercise of his right to a trial during closing argument. The prosecutor's argument included comments on defendant's constitutional right to a trial, including his right to confront his accuser, US Const, Am V, VI, XIV; Const 1963, art 1, §§ 17, 20. Although defendant relies on *Bell v State*, 723 So 2d 896, 897 (Fla App, 1998), as support for his argument that the prosecutor's remarks were improper, the court in that case found that similar remarks, although improper, were harmless.

In this case, the prosecutor explained that the complainant had been subject to cross-examination because defendant had the right to test her testimony. The prosecutor also explained that the complainant had been subject to more rigorous examination throughout the case, and asked the jury to consider that as a factor in evaluating her credibility. The prosecutor's remarks were reckless; however, considered in context, the prosecutor's remarks did not impugn defendant's exercise of his trial rights. Therefore, while we find the remarks, at a minimum, troublesome, we cannot say that the remarks amounted to plain error. Therefore, reversal is not warranted. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant also argues that the prosecutor improperly asked him to comment on the credibility of other witnesses during cross-examination. "It is generally improper for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). In this case, however, the prosecutor did not ask defendant to comment on the credibility of other witnesses, but rather was attempting to distinguish between defendant's version of events and the other witnesses' versions. It is not improper for a prosecutor to attempt to ascertain that a defendant's version of the facts differs from that of other witnesses. Such questioning does not require comment on the credibility of another witness. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). Accordingly, there was no plain error.

We also reject defendant's argument that defense counsel was ineffective for failing to object to the prosecutor's conduct. Even if counsel should have objected to the prosecutor's closing remarks, defendant has failed to establish that he was prejudiced by the remarks. *Pickens*, *supra* at 338; *Johnson*, *supra* at 124; *People v Dendel*, 481 Mich 114, 125; 748 NW2d 859 (2008). Further, counsel was not ineffective for failing to object to the prosecutor's cross-examination of defendant. As explained previously, there was no basis for an objection, and counsel was not required to make a futile objection. *Darden*, *supra* at 605.

Defendant lastly argues that defense counsel was ineffective for not objecting to Sergeant Metikosh's testimony about his attempts to interview defendant, and then for questioning Metikosh about whether he attempted to contact defendant's counsel. Defendant argues that Metikosh's testimony about attempting to interview him infringed on his right to remain silent. Because defendant was not in custody at the time to which Metikosh's testimony referred, we must reject defendant's argument.

A defendant's exercise of his right to remain silent, US Const, Am V, may not be used against him. *People v Bobo*, 390 Mich 355, 360-361; 212 NW2d 190 (1973). However, a defendant's silence is only constitutionally protected when the defendant is in custody or is questioned in a custodial situation. *People v Schollaert*, 194 Mich App 158, 164-166; 486 NW2d 312 (1992). In this case, it is clear that defendant was not in custody or in a custodial situation when he was contacted by Metikosh about being interviewed. In *People v Dunham*, 220 Mich App 268, 274; 559 NW2d 360 (1996), this Court held the prosecutor did not improperly refer to the defendant's exercise of his right to remain silent when he introduced evidence that the defendant canceled a scheduled interview with the police. The Court held that the defendant had not demonstrated a miscarriage of justice when the "defendant's Fifth Amendment right against self-incrimination was not violated because defendant was not in custody and had not invoked his Fifth Amendment right at the time the scheduled interview was canceled." *Id.*

For these reasons, defendant's Fifth Amendment rights were not violated by Metikosh's testimony. Accordingly, because any objection would have been futile, defense counsel was not ineffective for failing to object. *Darden*, *supra* at 605. Further, defendant has not explained how he was prejudiced by counsel's brief question asking Metikosh whether he attempted to contact defense counsel instead of defendant. *Dendel*, *supra* at 125.

Affirmed.

/s/ Alton T. Davis
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello